IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8951 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

POPSING ALIAS PAPPU NAVALSING PARIHAR

Versus

COMMISSIONER OF POLICE

Appearance:

MS DR KACHHAVAH for Petitioner No. 1

MR KAMLESH KACHHAVAH for Petitioner No. 1

MS MITA PANCHAL, AGP for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 15/10/2003

ORAL JUDGEMENT

1. By way of this Special Civil Application, the petitioner has challenged the order dated 11.06.2003

passed by the Police Commissioner, City of Ahmedabad, against him, in exercise of powers under Section 3(1) of the Gujarat Prevention of Anti Social Activities Act, 1985 (hereinafter referred to as "PASA Act") declaring the petitioner to be a "bootlegger" within the meaning of

the PASA Act, and directing the detention of the petitioner. In pursuance of the said impugned order in this petition, the petitioner is detained in jail since 11.6.2003.

2. The grounds served upon the petitioner and as placed on record reveal that the detaining authority took into consideration the fact that five offences came to be registered against the petitioner on 9.5.2002, on 4.6.2002, on 10.6.2002, on 27.9.2002 and on 6th of June, 2003 under Sections 66(b) and 65(e) of the Bombay Prohibition Act. The detaining authority also took into consideration two in-camera statements as recorded by sponsoring authority on 07.6.2003 and verified by the detaining authority on 09.6.2003, revealing the incidents of 5th of May, 2003 and 15th of May, 2003. From the above material, the order impugned came to be passed by the detaining authority.

3. Learned Advocate Mr.Kamlesh Kachhavah for learned Advocate Ms. DR Kachhavah for the petitioner and learned AGP Ms. Mita Panchal for the respondents were heard at length. The affidavit-in-reply filed by the detaining authority and as placed on record by learned AGP is also taken into consideration.

4. Out of various contentions raised on behalf of the petitioner, and controverted by the AGP, from rival contentions, it appears that the matter can be considered and be disposed of on the ground that whether right of liberty as engrafted under Article 22(5) of the Constitution of India of the petitioner is violated. On going through the grounds, it appears that the sponsoring authority relied upon in-camera statements, verified by the detaining authority, as said above. In the grounds served, the detaining authority has observed that the witnesses were called by him in person and after inquiry from the witnesses, he reached to the subjective satisfaction that their apprehension about the petitioner, was genuine, and therefore under Section 9(2) of the PASA Act, their identity was not disclosed in public interest though in affidavit-in-reply vide para-12, further explanation is offered by the detaining authority in addition to what is stated in the ground

that the witnesses were not ready and willing to come forward to register any complaint against the detenu because of fear and apprehension of insecurity to the lives and properties of the witnesses and their family members and, therefore, the claim under Section 9(2) was genuine, and therefore, the detaining authority reached to the subjective satisfaction that the apprehension expressed by the witnesses was honest, genuine and real nor the same was imaginary, fanciful, etc. It was also contended in the affidavit that any contemporaneous record was not referred by him.

5. While considering this issue, the ratio laid down by the Full Bench of this Court in the matter of CHANDRAKANT N. PATEL vs. STATE OF GUJARAT AND ORS, as reported in 1994 (1) GLR 761 clinches the issue. In para

7, while appreciating the decision of this Court in the matter of Bai Amina, the Full Bench of this Court observed as under :

> "7. If we examine the decisions in the case of Bai Amina and in the case of Balkrishna closely, it becomes clear that what has been briefly stated as the correct legal position as regard the nature and extent of the privilege in the case of Balkrishna, has been more elaborately stated in the case of Bai Amina. The consistency appearing in the said two decisions is more superficial than real. In the case of Balkrishna, the right of the detenu has been described as a matter of private interest whereas in the case of Bai Amina, this Court has regarded that interest as "another public interest" and this according to the learned Additional Public Prosecutor, is the basic inconsistency in the said two decisions. In Balkrishna's case, the interest of the detenu has been described as a private interest while considering reasonableness of the restriction on the fundamental right of the citizen. The context in which the said right has been described as a matter of private interest becomes clear from the following observation made by the Court in that case :
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> "..... But as a privilege can only be claimed in public interest, the Constitution has placed public interest above the private interest even though the private interest may mean the liberty

of the citizen."

Thus, the said observation came to be made by the Court in Balkrishna's case keeping the detenu in mind while the observation which has been made by this Court in Bai Amina's case is with reference to the nature and extent of the constitutional right of the detenu when he is detained by way of preventive action. In a case where a person is detained by way of a preventive action, it is the liberty of an individual detenu which is involved and in that sense, it can be said that it is a matter of private interest and not public interest. But the right of the person so detained is recognized as a fundamental right by the Constitution and taking away of such right can only be in public interest. Adversely affecting liberty and such a right, therefore, can properly be regarded as a matter of public interest. We are, therefore, of the opinion that there is no inconsistency between the ratio of the division bench decision in the case of Balkrishna and the ratio of the division bench in the case of Bai Amina. We are also of the opinion that even otherwise also, it cannot be said that Bai Amina's case does not lay down good law. As stated above, the observation which have been made as to when and how the privilege can be claimed are made with a view to show what can be regarded as proper application of mind to all the relevant aspects; what can be regarded as sufficient for the purpose of claiming privilege; and, when exercise of the privilege can be regarded as bona fide. Whether that privilege has been exercised bona fide and properly or not obviously will have to be decided in each case by reference to the facts of that case. In the case of Balkrishna and also in the case of Bai Amina, it has been so held. Considering the law relating to preventing detention, the nature of right conferred on the detenu and the circumstances under which that right can be adversely affected, we do not think that what has been held in Bai Amina's case is not good law. Whether the detaining authority can be said to have applied its mind to all the relevant aspects properly or not would be a question of fact in each case and will have to be decided with reference to the facts of that case. Since the satisfaction in this behalf has to be of the detaining authority, obviously, the promise of

> confidentiality given by the person recording the statement cannot by itself be regarded as sufficient ground for withholding the disclosure of such particulars and materials. But, if after considering the general background, character, antecedent, criminal tendency or propensity, etc. of the detenu and the reluctance of the witnesses who gave the statements against the detenu, the detaining authority is satisfied about the necessity of withholding some particulars or materials, then it cannot be said that the same was not done in public interest, and that public interest likely to be subserved by non-disclosure did not outweigh or override the public interest intended to be served by disclosure of the relevant particulars and materials to the detenu."

Accordingly, it is not reflected either from the grounds or from the affidavit that general background, character, antecedent, criminal tendency or propensity of the detenu and the reluctance of the witnesses, who gave the statements against the detenu, were taken into consideration by the detaining authority nor it is reflected either in the grounds or from the affidavit that this course is adopted, then, what material was relied upon by the detaining authority to claim privilege under Section 9(2) of the PASA Act. Consequently, the valuable right of the petitioner - detenu as to make effective representation is violated so as to render his further detention bad in law. In this view of the matter, the order impugned in this Special Civil Application is required to be quashed and set aside on this ground alone.

5. In the result, this Special Civil Application is allowed with no order as to costs. The order impugned in this Special Civil Application passed by the Police Commissioner, Ahmedabad City, on 11.06.2003 under Section 3(1) of the PASA Act against the petitioner is quashed and set aside. Petitioner is directed to be set at liberty forthwith if he is not required to be detained in jail for any other purpose. Rule made absolute. DS permitted.

(J.R. Vora, J.)

p.n.nair